

1 Deverie J. Christensen, Bar No. 6596
2 christensend@jacksonlewis.com
3 Marcus B. Smith, Bar No. 12098
4 marcus.smith@jacksonlewis.com
5 **JACKSON LEWIS LLP**
6 3800 Howard Hughes Parkway, Suite 600
7 Las Vegas, Nevada 89169
8 Tel: (702) 921-2460
9 Fax: (702) 921-2461

10 *Attorneys for Defendants, Bernard Broker,
11 Gary Jay Birkahn, Deanne Stoney, and
12 Las Vegas Convention and Visitors Authority*

13 **UNITED STATES DISTRICT COURT**

14 **DISTRICT OF NEVADA**

15 RICHARD E. EMEL,

16 Case No. 2:12-cv-01658-GMN-NJK

17 Plaintiff,

18 v.

19 BERNARD BROKER, an individual;
20 GARY JAY BIRKAHN, an individual;
21 DEANNE STONEY, an individual; LAS
22 VEGAS CONVENTION AND VISITORS
23 AUTHORITY, a public entity; and DOES
24 1 through 5,

25 Defendants.

26 **DEFENDANTS' PARTIAL MOTION TO
27 DISMISS**

28 Defendants Bernard Broker, Gary Jay Birkahn, and Deanne Stoney (collectively referred
1 to as the "Individual Defendants"), and Defendant Las Vegas Convention and Visitors Authority
2 ("LVCVA"), hereby move to dismiss all of Plaintiff Richard E. Emel's claims, with exception to
3 his claim under Title II of the Americans with Disabilities Act ("ADA") against Defendant
4 LVCVA, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

5 . . .

6 . . .

7 . . .

This motion is based on the attached memorandum of points and authorities, Plaintiff's Complaint, and any oral argument ordered by the Court.

Dated this 7th day of February, 2013.

JACKSON LEWIS LLP

/s/ Deverie J. Christensen
Deverie J. Christensen, Bar No. 6596
Marcus B. Smith, Bar No. 12098
3800 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169

Attorneys for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The issues raised in this motion are straightforward: federal and state law clearly provides that all of the claims raised by Plaintiff, with exception to his Title II ADA claim against LVCVA, either do not apply to the Defendants or are barred as a matter of law. Plaintiff's Title III ADA claim is entirely inapplicable to the Defendants because Title III applies only to private entities and the LVCVA is not a private entity—it is, as Plaintiff admits in his Complaint, a public entity; thus Title II applies. Plaintiff's Title II ADA claim against the Individual Defendants fails because individuals are not liable under Title II of the ADA. His claim under 42 U.S.C. § 1983, which is based solely on an alleged violation of Title II of the ADA, has been expressly foreclosed by the Ninth Circuit because Title II of the ADA is the exclusive remedy by which Plaintiff may vindicate the alleged Title II violations. Finally, Plaintiff's state law claims are barred because the Defendants are immune from such claims under Nevada law. Of all the claims asserted by Plaintiff in his Complaint, the only claim the law permits Plaintiff to bring is his claim against the LVCVA under Title II of the ADA. Though Defendants completely deny

1 the allegations in that claim, they appear sufficiently pled, at the dismissal stage, to proceed. The
 2 rest of the claims, however, must be dismissed as a matter of law.

3 **II. BACKGROUND**

4 This is a civil rights action. Plaintiff alleges the LVCVA and three of its employees
 5 violated his rights during a visit to the Las Vegas Convention Center on February 28, 2011.¹
 6 Plaintiff asserts the following allegations in support of his claims. Plaintiff attended a trade show
 7 at the Las Vegas Convention Center without incident on February 27, 2011, (Compl. ¶ 13), but
 8 when he returned the following day he was approached by LVCVA security officers, Bernard
 9 Broker and Gary Birkahn, at the direction of Deanna Stoney, an LVCVA customer services
 10 manager (Compl. ¶ 14). Plaintiff alleges Officers Broker and Birkahn asked if his dog was a
 11 service animal. (Compl. ¶¶ 15-16). Plaintiff responded “yes” and stated that he had the right to
 12 bring his service animal into the Convention Center. (*Id.*). The officers then asked Plaintiff to
 13 provide written proof of his disability and the status of his dog as a service animal, including a
 14 request for a “doctor’s note,” “paperwork,” or other “identification for the dog,” such as a
 15 “harness.” (*Id.*).

16 Plaintiff continued walking toward the entrance of the Convention Center as the security
 17 officers requested information, and began telling him that he could not take his dog into the
 18 building and would be arrested for trespassing. (Compl. ¶ 17). Plaintiff then said to the officers,
 19 “Fuck you. Call the Police,” as he walked around their Segways and continued toward the
 20 entrance of the Convention Center. (Compl. ¶ 18). Allegedly, he attempted to call 911 on his cell
 21 phone but Officer Broker drove a Segway over Plaintiff’s foot, at which time he “shouted, ‘You
 22

23 ¹ As the official destination marketing organization of Las Vegas, the LVCVA promotes
 24 tourism, conventions, meetings and special events, as well as ongoing advocacy to extend the
 25 city's influence as a leader in tourism and hospitality, and it operates the Las Vegas Convention
 26 Center. The Individual Defendants, Stoney, Birkhan, and Broker, are employees of the LVCVA;
 27 however, they are not Board Members, Executives, or senior members of management with any
 28 policymaking and decision making authority.

1 Mother Fucking Asshole! You ran over my foot!!!'." (Compl. ¶ 19). Thereafter, Officer Broker
 2 purportedly dismounted the Segway and "chest-bumped" Plaintiff several times. (Compl. ¶ 20).
 3 The officers then detained Plaintiff, placed him in handcuffs, and separated him from his dog,
 4 who remained with a friend that was accompanying Plaintiff to the Convention Center. (Compl.
 5 ¶¶ 21, 23). Plaintiff requested he be handcuffed in front of his body because of an existing lower
 6 back injury, but the officers refused. (Compl. ¶ 23).
 7

8 The officers then took Plaintiff to the LVCVA's Security Office and held him there until
 9 two officers from the Las Vegas Metropolitan Police Department ("Metro") arrived shortly after.
 10 (Compl. ¶¶ 23-24). The Metro Officers removed the handcuffs, interviewed Plaintiff, and issued
 11 him a citation for trespassing and battery against Officer Broker. (Compl. ¶¶ 24, 27). Plaintiff in
 12 turn signed a citation against Officer Broker for battery, and was then released from custody.
 13 (Compl. ¶ 27). Plaintiff sought treatment for a sprained foot, counseling, and also Emel's dog,
 14 Kole, was euthanized allegedly in part as a result of the distress caused by the encounter.
 15 (Compl. ¶¶ 30-31, 34). In March 2012, Plaintiff was charged for trespass and battery in Las
 16 Vegas Justice Court, but the charges were later dismissed by the District Attorney on the eve of
 17 trial. (Compl. ¶ 33).
 18

19 Plaintiff then filed a lawsuit against the LVCVA, Officers Broker and Birkahn, and
 20 customer services manager Deanna Stoney, asserting the following claims: (1) Americans with
 21 Disabilities Act ("ADA") Violation – Against all Defendants; (2) § 1983 Violation – Against All
 22 Defendants; (3) NRS 41.1395 – Against all Defendants; (4) False Arrest – Against all
 23 Defendants; (5) Battery NRS 200.400 – Against Officer Broker; and (6) Intentional Infliction of
 24 Emotional Distress – Against all Defendants. For the reasons discussed below, Defendants ask
 25 the Court to dismiss all of Plaintiff's claims with exception to the Title II ADA claim against the
 26 LVCVA.
 27
 28

1 **III. LEGAL STANDARD**

2 A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief
 3 can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "a short and
 4 plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).
 5 While Rule 8 does not require detailed factual allegations, it demands "more than labels and
 6 conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*,
 7 129 S. Ct. 1937, 1949 (2009) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "Factual
 8 allegations must be enough to rise above the speculative level." *Bell Atlantic Corp. v. Twombly*,
 9 550 U.S. 544, 555 (2007). Thus, to survive a motion to dismiss, a complaint must contain
 10 sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal*, 129 S. Ct.
 11 at 1949 (internal citation omitted).

12 In *Iqbal*, the Supreme Court recently clarified the two-step approach district courts are to
 13 apply when considering motions to dismiss. First, a district court must accept as true all well-
 14 pled factual allegations in the complaint; however, legal conclusions are not entitled to the
 15 assumption of truth. *Id.* at 1950. Mere recitals of the elements of a cause of action, supported
 16 only by conclusory statements, do not suffice. *Id.* at 1949. Second, a district court must consider
 17 whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* at 1950. A
 18 claim is facially plausible when the plaintiff's complaint alleges facts that allow the court to draw
 19 a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 1949. Where
 20 the complaint does not permit the court to infer more than the mere possibility of misconduct, the
 21 complaint has "alleged—but it has not shown—that the pleader is entitled to relief." *Id.* (internal
 22 quotation marks omitted). When the claims in a complaint have not crossed the line from
 23 conceivable to plausible, plaintiff's complaint must be dismissed. *Twombly*, 550 U.S. at 570.

24 ...

1 **IV. ARGUMENT**2 **A. Plaintiff's Claim Under Title III Of The ADA Must Be Dismissed In Its**
3 **Entirety Because Title III Does Not Apply To The Defendants**

4 Plaintiff improperly attempts to pursue a claim under Title III of the ADA, alleging that
5 Title III applies to the LVCVA because it operates a “commercial facility.” (Comp. ¶ 40).
6 However, a “commercial facility” is defined under Title III as a facility “intended for
7 nonresidential use by a *private entity*,” 28 C.F.R. § 36.104 (emphasis added), and the LVCVA is
8 not a private entity—it is, as Plaintiff admits in his Complaint, (Compl. ¶ 5), a public entity.²
9 Therefore, Plaintiff’s attempt to pursue claims under both Title II of the ADA, which applies to
10 public entities (such as the LVCVA), *Enyart v. Nat'l Conf. of Bar Examiners, Inc.*, 630 F.3d
11 1153, 1160 (9th Cir. 2011), and Title III of the ADA, which applies to private entities, *id.*, is
12 completely improper. As such, Plaintiff’s Title III claim must be dismissed in its entirety.

14 **B. Plaintiff's Claim Under Title II Of The ADA Must Be Dismissed As It**
15 **Pertains To The Individual Defendants Because Individuals Cannot Be Sued**
16 **Under Title II**

17 There is no cause of action against individuals under Title II of the ADA. *See D.K. v.*
18 *Solano County Office of Educ.*, No. 2:08-cv-00534-MCE-DAD, U.S. Dist. LEXIS 97585, *10 (E.
19 D. Cal. Dec. 2, 2008) (citing *Vinson v. Thomas*, 288 F.3d 1145, 1156 (9th Cir. 2002).³ Title II of
20 the ADA prohibits a “public entity” from discriminating against an individual based on his or her
21 disability. 42 USC §12132. Title II defines “public entity” as “any State or local government” or
22 “any department, agency, special purposes district, or other instrumentality of a State or States or

23 ² The LVCVA is a political subdivision of the state that established by state law.

24 ³ The Court in *D.K. v. Solano County Office of Educ.*, relies on *Vinson v. Thomas* for the
25 proposition that individuals cannot be sued under Title II of the ADA. However, a careful
26 examination of *Vinson* reveals that it holds and stands for the proposition that the remedial
27 scheme of Title II forecloses claims brought under § 1983. *Vinson*, 288 F.3d at 1156. However,
28 as demonstrated by the other cases cited in this analysis, the Court in *D.K. v. Solano County*
29 *Office of Educ.*, nevertheless reached the correct decision in holding that individuals cannot be
30 sued under Title II of the ADA even though its reliance on *Vinson* for that point was mistaken.

1 local government.” 42 USC §12131(1)(A)-(B). However, as explained in *Williams v. Hayman*,
 2 657 F. Supp. 2d 488, 502 (D. N. J. 2008), the term “public entity” does not include individuals.
 3 *See also Sindram v Merriwether*, 506 F. Supp. 2d 7, 11 (D.C. Col. 2007) (holding that, based on
 4 precedent across many circuits, it is “abundantly clear” that Title II “does not provide for
 5 individual capacity suits”); *Sagan v Sumner County Bd. of Educ.*, 726 F. Supp. 2d 868, 876 (M.D.
 6 Tenn. 2010) (holding that individual-capacity claims under Title II must be dismissed with
 7 prejudice and citing several circuit court decisions for that proposition).⁴ Here, Plaintiff has sued
 8 the LVCVA’s employees only as individuals. (Compl. ¶¶ 2, 3, 4). Accordingly, Plaintiff’s Title
 9 II claim against the Individual Defendants should be dismissed because a plaintiff cannot bring an
 10 action against individuals under Title II of the ADA.

11 Moreover, Title II’s remedies provision does not provide for a cause of action against
 12 individuals. Title II’s remedies provision, 42 U.S.C. § 12133, incorporates (for its source of
 13 remedies) the remedies provision of the Rehabilitation Act, which, in turn, states that a plaintiff’s
 14 remedies are “set forth in” 42 U.S.C. § 2000e-16 and 42 U.S.C. § 2000d et seq., both of which are
 15 elements of the Civil Rights Act of 1964. The remedies “set forth” in § 2000e-16, however, are
 16 available only where the defendant is a “head of department, agency, or unit” sued in his official
 17 capacity. *Mays v. U.S.P.S.*, 928 F. Supp. 1552, 1568 (M.D. Ala. 1996) (citing § 2000e-16(c)). In
 18 other words, § 2000e-16 allows for no remedy against a defendant being sued as an individual
 19 and, as such, neither does Title II. *Key v. Grayson*, 163 F. Supp. 2d 697, 704 (E.D. Mich. 2001).
 20 For these reasons, Plaintiff’s Title II claim against the individuals must be dismissed.

21 **C. Plaintiff’s Section 1983 Claim Must Be Dismissed Because It Is Foreclosed By
 22 Title II Of The ADA**

23 A plaintiff may pursue a claim under 42 U.S.C. §1983 if a person acting under color of
 24 state law engages in conduct that deprives the plaintiff of a federal statutory right. *Sandoval v.*
 25 *Las Vegas Metropolitan Police Department*, 854 F. Supp. 2d 860, 871 (Dist. Nev. 2012), *citing*
 26 *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir. 1997). However, there are some federal

27
 28 ⁴ The Court in *Williams* discussed other cases, including circuit court cases, that held Title
 II does not authorize suits against individuals. *Williams*, 657 F. Supp. 2d at 502.

1 statutes on which a plaintiff may not predicate his or her § 1983 claim. One such statute is Title
 2 II of the ADA. Indeed, the Ninth Circuit has expressly and repeatedly held that Title II of the
 3 ADA forecloses, or bars, §1983 claims. *Vinson v. Thomas*, 288 F.3d 1145, 1156 (9th Cir. 2002);
 4 *Okwu v. McKim*, 682 F.3d 841, 844 (9th Cir. 2012). Specifically, the Ninth Circuit has held that
 5 “the specificity and comprehensiveness of [Title II’s] remedies suggested that Congress intended
 6 the Title II remedial scheme to be the exclusive means by which a party could vindicate his Title
 7 II ADA rights, and that allowing the plaintiff to use the more general §1983 remedial scheme
 8 instead would be contrary to Congress’s intent.” *Okwu*, 682 F.3d at 844. In other words, the
 9 courts are “not free to interpret § 1983 in a way that provides a substitute remedy that Congress
 10 never provided.” *Id.* at 846. Here, Plaintiff’s Complaint expressly states that the sole basis for
 11 his §1983 claim is the violation of his ADA Title II rights. (Compl. ¶ 46). Thus, Plaintiff’s claim
 12 is entirely and solely based on the alleged ADA Title II violations. Accordingly, because the
 13 Ninth Circuit has held that such claims are foreclosed by Title II of the ADA, Plaintiff’s § 1983
 14 claim must be dismissed in its entirety. *See Vinson*, 288 F.3d at 1156; *Okwu*, 682 F.3d at 844.⁵

17 **D. Plaintiff’s State Law Claims Should Be Dismissed Because Defendants Are
 18 Immune From Such Claims**

19 Plaintiff asserts state law claims against all of the Defendants for violation of NRS
 20 41.1395 (which prohibits abuse or neglect of vulnerable persons), false imprisonment, and
 21 intentional infliction of emotional distress. He also asserts a claim for battery against Defendant
 22 Broker. However, Plaintiff’s state law claims must be dismissed because the Defendants are
 23 immune from suit under NRS 41.031 and NRS 41.032. NRS 41.031(1) authorizes suits against
 24 political subdivisions of the State of Nevada (such as LVCVA) and their employees but only in
 25 limited circumstances. A suit is not authorized where an action is brought against a political
 26 subdivision and its employees, “[b]ased upon the exercise or performance or the failure to

27 ⁵ Moreover, even if Title II does not bar Plaintiff’s §1983 claim (and it does), Plaintiff’s §
 28 1983 claim still fails as to the LCVVA for lack of an offending policy or custom, and as to the
 Individual Defendants because they are entitled to qualified immunity under § 1983.

1 exercise or perform a discretionary function of duty on the part of the State or . . . political
 2 subdivisions or any . . . employee . . . whether or not the discretion involved is abused.”
 3 NRS 41.032(2) (emphasis added).

4 Here, Defendants Stoney, Broker and Birkahn were performing discretionary functions by
 5 engaging in independent judgment, inquiry and determination as to whether Plaintiff and his dog
 6 were legally permitted to enter the LVCVA’s public facilities to access the public programs
 7 offered at the Convention Center. They exercised discretion by identifying Emel and his dog,
 8 (Compl. ¶ 14), questioning whether the dog was permitted to enter the Convention Center,
 9 (Compl. ¶¶ 15, 16), deciding whether to warn Plaintiff of trespass, (Compl. ¶ 17), and when
 10 deciding to arrest, handcuff, and detain Plaintiff (Compl. ¶¶ 21, 23, 24). The fact that the
 11 Individual Defendants may have “abused” their discretion by requesting documentation of Emel’s
 12 dog’s status as a service animal is not relevant. “In analyzing discretionary-function immunity, a
 13 court does not ask whether the official abused his or her discretion, but only whether the acts
 14 concerned a matter in which the official had discretion.” See NRS 41.032(2); *Sandoval v. Las*
 15 *Vegas Metropolitan Police Department*, 854 F. Supp. 2d at 880.

16 Accordingly, immunity applies and Emel cannot pursue any state law claims against the
 17 LVCVA and Individual Defendants based on the events of February 28, 2011, at the Convention
 18 Center. Further, for example, courts have concluded that law enforcement officers are “generally
 19 afforded discretionary-function immunity in conducting an investigation and effectuating an
 20 arrest so long as the officer does not violate a mandatory directive in doing so.” *Sandoval v. Las*
 21 *Vegas Metropolitan Police Department*, 854 F. Supp. 2d at 880-881. The Nevada Supreme Court
 22 also has found that law enforcement officers exercise discretion through deliberation, decision
 23 and judgment when arresting and handcuffing a person suspected of committing a crime. *Maturi*
 24 *v. Las Vegas Metropolitan Police Department*, 110 Nev. 307, 309-310 (1994).⁶

25 . . .

26 . . .

27 ⁶ For the Court’s edification, the LVCVA Officers are not average private security guards.
 28 They are uniformed, fully armed and equipped similar to Metro officers, and most are retired
 police officers.

V. CONCLUSION

For the reasons set forth above, Plaintiff's Complaint should be dismissed in its entirety, with the exception of his claim against the LVCVA under Title II of the ADA.

Dated this 7th day of February, 2013.

JACKSON LEWIS LLP

/s/ Deverie J. Christensen
Deverie J. Christensen, Bar No. 6596
Marcus B. Smith, Bar No. 12098
3800 Howard Hughes Parkway
Suite 600
Las Vegas, Nevada 89169

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I am an employee Jackson Lewis LLP and that on this 7th day of February, 2013, I caused to be sent via ECF filing, a true and correct copy of the above and foregoing **DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT IN ITS ENTIRETY** properly addressed to the following:

Travis N. Barrick
Gallian Welker & Beckstrom, L.C.
540 E. St. Louis Ave.
Las Vegas, Nevada 89104

James W. Claflin, Jr.
Claflin Law Ltd.
3753 Howard Hughes Pkwy., Ste. 200
Las Vegas, NV 89169

Attorneys for Plaintiff

/s/ Rae J. Christakos
Employee of Jackson Lewis LLP